

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

A recitation of the history of these two consolidated requests for review from separate decisions in this case is necessary. On June 27, 2001, Administrative Law Judge Bryce D. Benedict entered an Order which denied the Fund's Motion to Strike the independent medical evaluation of Dr. Revis C. Lewis. The Order additionally denied the Fund's request for an extension of terminal dates. Although there was no record made of the hearing on the motion, it appears the Fund argued in the alternative that its terminal date be extended in order to arrange for the doctor's deposition.

On June 29, 2001, the Fund filed a timely request for review with the Board. Before this matter could be heard by the Board, the Administrative Law Judge entered his Award in this case on July 26, 2001. The claimant filed a timely application for review of the Award and by agreement of the parties, the two requested reviews were consolidated for hearing before the Board.

With regard to the review from the Order dated June 27, 2001, the Fund argues the Administrative Law Judge erred in denying its Motion to Strike the independent medical report of Dr. Lewis because its right to cross-examine the doctor was precluded.

Conversely, claimant argues K.S.A. 44-510e provides the court ordered independent medical evaluation is part of the evidentiary record and the Fund had approximately five years to arrange for the doctor's deposition.

On July 26, 2001, the Administrative Law Judge awarded claimant an 18 percent permanent partial scheduled loss of use of his left foot. But the Judge concluded claimant's psychological impairment was unrelated to his work-related accident of September 25, 1987.

With regard to the review from the Award dated July 26, 2001, the claimant argues that as a result of his work-related injury of September 25, 1987, he is now permanently and totally disabled.

Conversely, respondent and the Fund argue in the alternative, if the matter is not remanded for the opportunity to cross-examine Dr. Lewis, the Administrative Law Judge's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Initially, the Board will address the facts regarding the Fund's request for review from the June 27, 2001, Order denying its Motion to Strike the report of Dr. Revis Lewis.

On April 11, 1996, Special Administrative Law Judge William F. Morrissey, entered an Order Appointing Independent Health Care Provider. The Order, pursuant to K.S.A. 44-510e, appointed Revis Lewis, M.D., and Roy B. Lacoursiere, M.D., to each examine claimant and render opinions regarding his functional impairment. Dr. Lewis' report dated May 6, 1996, was filed with the Administrative Law Judge on May 9, 1996.

The case finally proceeded to regular hearing on December 7, 2000, and terminal dates for the presentation of evidence were set. Thereafter, pursuant to agreements among the parties, the terminal dates were extended several times.

In May 2001, the Fund contacted Dr. Lewis and was told the doctor no longer provided deposition testimony. On June 1, 2001, the Fund filed a Motion to Strike Dr. Lewis' May 6, 1996, report.

The Fund argues that Dr. Lewis' report should be stricken because it was not allowed to cross-examine the doctor.

The Administrative Law Judge's Order appointing Dr. Lewis as an independent medical examiner was entered pursuant to K.S.A. 44-510e (Furse 1993) which stated in pertinent part:

If the employer and the employee are unable to agree upon the employee's functional impairment, such matter shall be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

The Court of Appeals has ruled that the above quoted language creates "a narrow exception to the general rule of K.S.A. 44-519" which precludes introduction of health care provider's reports unless supported by the testimony of the health care provider.¹

Herein, the ordered independent medical examination was made pursuant to K.S.A. 44-510e (Furse 1993) and pursuant to the version in effect on the date of accident, that statute provided for the report to be considered by the Administrative Law Judge without

¹Sims v. Frito Lay, Inc., 23 Kan. App.2d 591, 933 P.2d 161 (1997); see also McKinney v. General Motors Corp., 22 Kan. App.2d 768, 921 P.2d 257 (1996).

the testimony of the physician. In applying the Sims and McKinney logic, the Board concludes Dr. Lewis' independent medical examination may be admitted without the physician's testimony.

K.A.R. 51-9-6 states:

If a neutral physician is appointed, the written report of that neutral physician shall be made a part of the record of hearing. Either party may cross-examine each neutral physician so employed. The fee of the neutral physician giving such testimony shall be assessed as costs to a party at the administrative law judge's discretion.

The administrative regulation allows the report of a neutral physician to be made a part of the record of hearing. It is further noted that the parties "may" cross-examine the physician.

The Fund argues it was unable to cross-examine Dr. Lewis and therefore his report should be excluded from the record. The Board disagrees because the facts do not support the Fund's contention that it was unable to cross-examine the doctor.

The Fund failed to subpoena the doctor and relies on an assertion from the doctor that he no longer gives depositions. No further explanation was proffered. The difficulty with the Fund's position is the substantial amount of time that elapsed between the time the doctor's report was filed and the belated attempts to arrange for the doctor's deposition. Dr. Lewis' court ordered independent medical evaluation was filed May 9, 1996. It cannot be seriously argued that during the intervening five years the Fund did not have more than ample opportunity to arrange for the doctor's deposition had it so desired.

Under this factual situation the Administrative Law Judge was correct in denying the request for an extension of time to arrange for the doctor's deposition. The Board concludes the medical report prepared by the independent medical examiner, Dr. Lewis, was properly considered by the Administrative Law Judge and is part of the evidentiary record.

The issue raised by the claimant on review from the Administrative Law Judge's July 26, 2001, Award is whether he is permanently and totally disabled as a result of the September 25, 1987, accident. Claimant argues that he not only injured his foot but also injured his back. Claimant further argues that as a result of the chronic pain his preexisting post-traumatic stress disorder and other personality disorders were aggravated. Claimant concludes that as a result of his psychological problems he is permanently and totally disabled.

The Board adopts the Administrative Law Judge's findings and conclusions as its own as if specifically set forth herein. The Board agrees with the Administrative Law

Judge's analysis of the evidence as set forth in the Award and, accordingly, affirms the Award for an 18 percent functional impairment to the left foot.

The claimant suffered an injury to his foot on September 25, 1987. After being released from treatment the claimant returned to his former employment. Although claimant testified he had also received treatment for his back, it was not until April 1990 that there is a notation regarding back pain in the voluminous medical records filed in this matter.² A review of the medical records simply does not support claimant's contention that he suffered either an aggravation or injury to his back as a result of the September 25, 1987, accident.

It is undisputed that claimant suffers from symptoms of post-traumatic stress disorder which is a result of his military service in Vietnam. Both Drs. G. R. Wurster and Lacoursiere concluded this condition was not caused by the September 25, 1987, accident. In addition, Dr. Lacoursiere specifically noted claimant's preexisting psychiatric condition was neither caused nor exacerbated by the September 25, 1987, accident.

The Administrative Law Judge noted the medical records from the Veterans Administration contained numerous references where claimant attributed his inability to work to his back and his emotional problems. The claimant's back problems were not related to his September 25, 1987, accident. The medical records further reveal that claimant's severe psychological deterioration and perceived inability to work began in 1990, or approximately three years after the accident. The Board concludes the claimant has failed to establish his psychological impairment is directly traceable to the work-related injury to the foot.³

The Board is not unmindful of the testimony of Dr. Wurster which concludes there was an aggravation of claimant's personality disorder from the September 25, 1987, accident. However, Dr. Wurster related the aggravation of claimant's personality disorder to his inability to work because of his reaction to his back pain. As previously indicated, the back pain was not related to the September 25, 1987, accident. Moreover, the Board concludes Dr. Lacoursiere's opinion is based on a more accurate history and is accordingly more persuasive.

AWARD

²It appears several earlier references of back pain in the veteran's administration records were related to kidney stone problems.

³Love v. McDonald's Restaurant, 13 Kan. App.2d 397, 771 P.2d 557, rev. denied 245 Kan. 784 (1989).

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated June 27, 2001, is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated July 26, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Derek Shafer, Attorney for Claimant
 James E. Martin, Attorney for Respondent
 Matthew Crowley, Attorney for Fund
 Bryce D. Benedict, Administrative Law Judge
 Philip S. Harness, Workers Compensation Director